

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33953/33961

STATE OF IDAHO,)	2008 Unpublished Opinion No. 462
)	
Plaintiff-Respondent,)	Filed: May 13, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
MITCHELL JAMES FREEMAN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Daniel B. Meehl, District Judge.

Order revoking probation and requiring execution of consecutive unified ten-year sentences with five-year determinate terms for two charges of grand theft, affirmed; order denying I.C.R. 35 motions for reduction of sentences, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sara B. Thomas, Chief, Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Mitchell James Freeman appeals the revocation of his probation and the denial of his Rule 35 motions for reduction of his sentences for grand theft.

I.

FACTUAL & PROCEDURAL BACKGROUND

In two cases that were consolidated below and on appeal, Freeman pleaded guilty to two charges of grand theft, Idaho Code §§ 18-2403(3), -2407(1)(b). District Judge John Hohnhorst imposed consecutive unified ten-year sentences with five-year determinate terms, but after a period of retained jurisdiction, suspended the sentences and placed Freeman on probation. Among the terms of his probation was that Freeman pay costs and a victim fee, reimburse the public defender, and pay restitution to the victims. He was to make monthly payments to satisfy these obligations. On July 14, 2006, the State filed a petition for a probation violation, alleging

that Freeman had not made sufficient payments. The State also submitted an addendum to the report of probation violation dated September 25, 2006, alleging that Freeman did not file a monthly report due in September 2006, failed to inform his probation officer that he had been fired from his job, and absconded from probation.¹ Freeman admitted to all of these violations, but testified that his failure to make payments was due to his indigence. The district court, with Judge Daniel Meehl now presiding, revoked probation and ordered execution of the original sentences. Freeman then filed Idaho Criminal Rule 35 motions for reduction of the sentences which were denied. He now appeals, contending that the district court abused its discretion in revoking probation and in denying his I.C.R. 35 motions for reduction of the sentences.

II.

ANALYSIS

A. Revocation of Probation

Freeman first argues that the district court abused its discretion and violated his right to due process when it revoked his probation. In particular, he contends that the revocation of probation was inappropriate because, although he had not made the various payments required as a condition of his probation, he was unable to do so because he was indigent. He further argues that the district court's decision to revoke probation was an abuse of discretion because the court did not consider whether the revocation of probation was an appropriate remedy in light of the relevant factors.

A court may not revoke probation without a finding that the probationer violated the terms of probation. *State v. Blake*, 133 Idaho 237, 243, 985 P.2d 117, 123 (1999); *see* I.C. §§ 19-2603, 20-222. Once a violation is found, it is within the trial court's discretion to revoke probation. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v.*

¹ While this addendum apparently is not in the district court file, it was discussed by the parties at the January 9, 2007, hearing in which Freeman admitted to probation violations, and the prosecutor showed a copy of the addendum to the court at that time. On appeal, Freeman argues that he received no notice of these alleged violations, and that they therefore could not serve as a basis for finding that he had violated his probation. From the transcript, however, it is clear that Freeman was aware of these additional allegations, and so there is no due process violation. Further, he did not object to the district court's consideration of the addendum, and raises the issue for the first time in his reply brief. We therefore will not address this argument.

Hass, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is (1) achieving the goal of rehabilitation and (2) consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325, 834 P.2d at 327.

Freeman correctly notes that unless the State shows a violation is “willful,” it is fundamentally unfair for the court to revoke probation without first considering whether adequate alternative methods of punishing the defendant are available. *State v. Knutsen*, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003); *State v. Lafferty*, 125 Idaho 378, 382, 870 P.2d 1337, 1341 (Ct. App. 1994). The case *Bearden v. Georgia*, 461 U.S. 660 (1983) is illustrative. In that case, the United States Supreme Court held that a defendant’s probation could not be revoked solely for failure to pay a fine and make restitution absent evidence that the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay. The Court also noted that if the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, probation could be imposed only if alternate measures would not be adequate to meet the State’s interests in punishment and deterrence.

In this case, however, the court did not revoke probation based solely on Freeman’s failure to pay restitution and other fees, but also because of the other violations to which he admitted, including failing to make required reports to his probation officer and absconding. Freeman argues that the district court did not rely on any of the other probation violations when it decided to revoke Freeman’s probation, but the record does not support this assertion. It is true that much of the disposition hearing centered on Freeman’s failure to make payments. He testified about his inability to meet this obligation because of difficult family circumstances and the State addressed this violation on cross-examination and in argument. However, the State also pointed out that Freeman absconded from probation in September 2006, and was not apprehended for several months. The State also noted that Freeman had a habit of evading the authorities in this manner, for he had failed to appear in the underlying criminal matter and been at large for a number of years. In explaining its decision to revoke probation, the district court expressed understanding that Freeman had been under a good deal of stress, but cited Freeman’s

failure to stay in communication with his probation officer as a serious violation. The court also mentioned that Judge Hohnhorst had warned Freeman about the consequence of probation violations. From the totality of these comments, it is evident that the district court's decision to revoke probation was based primarily on the fact that Freeman had absconded from supervision.

As noted above, in determining whether to revoke probation a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. Freeman contends that the district court abused its discretion because it did not consider these factors. In particular, he notes the district court's comment that "Judge Hohnhorst said if you do violate your probation you're going up and he speaks for the court." While this statement is somewhat troubling, when all the district court's statements are considered, especially the district court's concerns about Freeman's failure to maintain contact with his probation officer, it is clear that the district court was not automatically revoking probation, but was considering whether continued probation would meet the goals of rehabilitation and the protection of society. Absconding from probation directly undercuts both of these goals, particularly when combined with Freeman's history of evading the authorities. This act of absconding clearly demonstrates that Freeman was unsupervisable and an inappropriate candidate for continuing on probation. We therefore hold that the district court did not abuse its discretion in revoking Freeman's probation.

B. Denial of Rule 35 Motions

Freeman also contends that the district court abused its discretion when it denied Freeman's Rule 35 motions. A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984).

Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion in denying Freeman's I.C.R. 35 motions for reduction of the sentences. Therefore, the order revoking probation and directing execution of Freeman's previously suspended sentences and the order denying Freeman's I.C.R. 35 motions are affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**